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NO. 84-1450

IN THE

Supreme Court of the United States

October Term, 1984

STEPPING STONES ASSOCIATES,
Petitioner,

vs.

THE CITY OF WHITE PLAINS,
Respondent.

Brief for Respondent In Opposition to Petition for Writ of Certiorari to the New York State Court of Appeals

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STEPPING STONES ASSOCIATES,

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vs.

THE CITY OF WHITE PLAINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.*

BRIEF FOR RESPONDENT IN OPPOSITION.

The Respondent opposes the petition for a writ of certiorari to review the decision of the New York State Court of Appeals* dated December 13, 1984. That decision affirmed the judgment of the Appellate Division, Second Department, dated March 26, 1984, which upheld the legality of respondent municipality's water rates.

*The language of the Petition, "for a writ of certiorari to the United States Court of Appeals for the Second Circuit" is an obvious error.

Opinions Below.

The opinion of the New York State Court of Appeals is reported at 64 NY2d 690 and reproduced in the Appendix to the Petition at p. A-1. The opinion of the Appellate Division, Second Department is reported at 100 AD2d 619 (2d Dept., 1984) and reproduced in the Appendix to the Petition at pp. A-4-A-5. The opinion of the Special Term Judge is reported at 116 Misc. 2d 951 (Sup. Ct., West. Co., 1982) and is reproduced in the Appendix to the Petition at pp. A9-A12.

Jurisdiction.

The petitioner relies on 28 U.S.C. §1257(3).

Question Presented.

Whether the water rates of the respondent violate petitioner's equal protection or due process rights.

Constitutional and Statutory Provisions Involved.

Petitioner claims a violation of the United States Constitution, Article III, Section 2, Clause 1 and Article XIV, Section 1.

No New York State Constitution or statutory violations are claimed.

Statement of the Case.

On April 27, 1981, the Common Council of The City of White Plains adopted an ordinance approving new "Charges, Fees and Deposits" for water consumption in

the City. See, Appendix to Petition, p. A-21. The rates for consumption were set at a "graduated" or "incremental" scale. Their purpose was "to make [the City's] water system self sustaining and to encourage conservation." Appendix to Petition, A-5, and, see A-10.

Petitioner brought an action for a judgment declaring that these rates were "discriminatory and in violation of the equal protection guarantees of the Constitution." Petition, p. 6.

The trial court granted petitioner's motion for summary judgment. The Appellate Division of the Supreme Court unanimously reversed the judgment of the trial court, and the Court of Appeals unanimously affirmed the judgment of the Appellate Division.

Reasons for Denying the Writ.

1. The decision of the New York State Court of Appeals is in no way in conflict with *McDonald v. Miller*, 414 U.S. 1158 (1974).

It must first be pointed out that the case cited by petitioner was a denial of a petition for certiorari, and thus has no precedential value. Just as important, however, is that that case involved an attack on an ordinance dealing with garbage collection, which ordinance was held by the Supreme Court of Indiana to be violative of the equal protection clause of the Fourteenth Amendment since disposal service was denied to apartment houses with five or more units.

Involved in this case are charges for water based upon the amount of water consumed. There is no classification

of users; just a rate schedule by virtue of which "the more you use, the more you pay." The Appellate Division and the Court of Appeals both held: "Since this fee system is rationally related to the city's legitimate goals of establishing a self-supporting water fund and water conservation, the rate structure is not unconstitutional." Appendix to Petition, p. A-5. The New York courts also held that the petitioner had not met its burden of proof. Appendix to Petition, A-4. *Marcus Assoc. v. Town of Huntington,* 45 N.Y.2d 501 (1978); *Kurzius v. Upper Brookfield,* 51 N.Y.2d 338 (1980).

2. The decision of the New York State Court of Appeals is in no way in conflict with *Seatle Trust Co. v. Roberge,* 278 U.S. 116 and *Nectow v. Cambridge,* 277 U.S. 183.

Both cases in this Court cited and relied upon by petitioner in Point 2 of its petition were zoning cases. That the law applicable to zoning cases has no application to cases involving water rates should need no citation; but, the Appellate Division of the Supreme Court and the Court of Appeals have both found that the water rates in question here were established pursuant to Municipal Home Rule Law, Sec. 10, subd 1, pars [i], [ii] cl a, subcl [9-a], and that the rates can properly vary based on usage, citing Public Service Law, Section 89-c, subd. 12; see *Town Board of Town of Poughkeepsie v. City of Poughkeepsie,* 22 AD2d 270 (2d Dept. 1964).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: April 4, 1985

Respectfully submitted,

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